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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-1527

LUIS J. LAJE,

Petitioner,

v.

R. E. THOMASON GENERAL HOSPITAL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Fifth Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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R. E. THOMASON GENERAL HOSPITAL, Respondent, Respectfully submits that there is no error in the decision of the Fifth Circuit Court of Appeals and no cause exists for issuing a Writ of Certiorari in this case.

STATEMENT OF THE CASE

The Opinion of the Fifth Circuit Court of Appeals contained in Appendix B-1 through B-5 of the Petition for Writ of Certiorari more correctly and clearly states the facts than does Petitioner's Statement of the case.

CONFLICT OF DECISIONS

A. *PETITIONER WAS NOT DENIED A FAIR AND IMPARTIAL HEARING.*

The Opinion of the Fifth Circuit in this case is not in conflict with the decision in *Klinge v. Lutheran Charities Association of St. Louis*, 523 F. 2d 56, because medical doctors did review Dr. Laje's cases. Neither is the Opinion below in conflict with this Court's Decision in *Peters v. Kiff*, 407 U. S. 473, which dealt with a state prisoner's petition for writ of habeas corpus.

Dr. Marks, Dr. Jones, Dr. Raskin, Dr. Hernandez and Dr. Huddleston all reviewed the cases of Dr. Laje. They are all competent physicians and some of them had actually seen some or all of the patients involved. It is absurd to assume that all four members of the medical staff who are trained psychiatrists are incapable of evaluating sixteen cases and incompetent to form an opinion as to Dr. Laje's competency. Those doctors had a duty to do just that. *Giles v. Breaux*, 160 So. 2d 608 (La. 1964); *Woodbury v. McKinnon*, 447 F. 2d 839 (5th Cir. 1971).

Indeed, tort liability can be imposed for the mere selection and admission of physicans whose subsequent negligence injures a hospital's patients. *Purcell v. Zimbleman*, 18 Ariz. App. 75, 500 P.2d 335 (1972); *Mitchell County Hospital Authority v. Joiner*,

299 Ga. 140, 189 S.E.2d 412 (1972); *Darling v. Charleston Memorial Hospital*, 33 Ill. 2d 326, 211 N.E. 2d 253 (1965); *Corleto v. Shore Memorial Hospital*, 350 A.2d 534, N.J. Super Ct. (1975); *Rao v. Board of County Commissioners*, 497 P.2d 591 (Wash. 1972).

The doctors' testimony in this case was not "conflicting" as the trial court observes. One would think the court is making a fact finding that a conspiracy exists. The testimony may not be entirely consistent with each medical witness but one thing is uniform: all of the doctors were critical of Dr. Laje's diagnoses and errors in medical judgment. With this opinion they had a duty to come forward and give testimony. *Purcell v. Zimbleman*, supra; *Mitchell County Hospital Authority v. Joiner*, supra; *Rao v. Board of County Commissioners*, supra.

B. *THE FIFTH CIRCUIT PROPERLY REJECTED THE STATISTICAL EVALUATION OF DR. BAYLOR AS SUBSTITUTING MATH THEORY FOR EVALUATION OF MEDICAL COMPETENCE.*

The Fifth Circuit Opinion clearly does not conflict with this Court's Opinion in *Rizzo v. Goode*, 423 U.S. 362. It merely held that it is improper to discount the evidence against Dr. Laje "because of statistical flaws in the nonrandom selection of cases and the small sample size".

It is ludicrous to contend that the opinions of these physicians on the question of Petitioner's competency as a physician can be impeached by a mathematician's theory of "scientific sampling". Dr. Baylor's conclusion in the last sentence of his affidavit is a statistical comment and not based upon medical knowledge or any knowledge or understanding of the medical files reviewed or of the standard of care required of psychiatrists in El Paso.

Dr. Baylor even asks us to *assume* the sixteen cases "reflect adversely on Dr. Laje" in making his conclusion. How many people would Dr. Laje have to hurt or kill through incompetence before Dr. Baylor would agree with the opinions of other psychiatrists on the question of competency?

The Trial Court, Petitioner and Dr. Baylor ignore the obvious. We are dealing with human lives and with fragile minds — *not statistics*. What of the surgeon who has thousands of successful cases and then a half dozen patients die as a result of incompetence? Is the hospital board to overlook the competence because of the statistics?

C. *THE CHARGE OF INSUBORDINATION WAS FOUNDED ON "SUBSTANTIAL MEDICAL BASIS" AND THE BOARD'S FINDINGS WERE NEITHER ARBITRARY NOR CAPRICIOUS.*

The Fifth Circuit has taken the view in *Sosa* that general standards such as "a high quality of medical care" are acceptable for a hospital. Admittedly, a series of California cases hold that such general standards are too vague. But that is not the law of Texas.

The recent case of *Huffaker v. Bailey, et al*, 540 P.2d 1398 (Ore. Sup. — 1975) contains an excellent discussion of the insubordination point:

> "Petitioner also apparently contends, though not with crystal clarity, that the criterion of documented ability to work well with others is not a valid consideration because it has no bearing on petitioner's *medical* competence and is not related to the quality of patient care.
>
> "This contention has some merit, and raises a rather sensitive issue. The issue of a pleasant and cooperative personality has no direct influence on medical competence

in a technical sense. But it must be remembered that the hospital is concerned not only with medical competence, but primarily with the *quality of care* the patients receive in the hospital. Petitioner cites *Rosner v. Eden Township Hospital District*, supra, for the proposition that temperamental suitability for cooperative staff hospital work is not a proper consideration relating to effective patient care. A California statute, however, provided that staff membership in public hospitals was restricted to doctors 'competent in their respective fields, worthy in character and in professional ethics.' The California Supreme Court construed this statute as delineating the *exclusive* criteria for public hospital staff membership, and held that under the statute the additional consideration of temperamental suitability was not an authorized criterion. *Rosner*, therefore, does not provide direct support for Petitioner's argument.

"Most other courts have found that the factor of ability to work smoothly with others is reasonably related to the hospital's object of ensuring patient welfare. This conclusion seems justified for, in the modern hospital, staff members are frequently required to work together or in teams, and a member who, because of personality or otherwise, is incapable of getting along, could severely hinder the effective treatment of patients. As stated in *Silver v. Castle Memorial* Hospital, 53 Hawaii 475, 497 P.2d 564, 568, *cert. denied*, 409 US 1048 (1972), '[T]he absence of a compatible team working together could impair the doctor's performance and consequently undermine the effectiveness of the treatment given the patient.' Hospitals uniformly consider cooperativeness an important factor, and in these circumstances it seems questionable whether this court should gainsay the hospitals' experience and judgment in this matter."

Denial of staff privileges has been upheld where a doctor was found to have a "negative relationship" with the staff and his presence was "disruptive" according to the Chief of Staff. *Schooler v. Navarro County Memorial Hospital*, 375 F. Supp.

841 (U.S.D.C.-Tex. 1974). See also: *Don v. Okmulgee Memorial Hospital*, 443 F.2d 234 (Tenth Circuit 1971).

It seems clear from the evidence that there was indeed substantial personality conflict between Dr. Laje and all of the doctors who testified and that the hospital board determined he created a negative relationship that was disruptive to hospital routine and jeopardized the care of patients. It is clear Petitioner's right to staff privileges were outweighed by the patients' right to quality, competent care and the Respondent's duty to provide a competent staff. Conflict among a psychiatric staff is not condusive to good patient care. Under the *Huffaker* case, supra, 540 P.2d 1398, *Silver* case, supra, 497 P.2d 564, and *Schooler* case, supra. 375 F. Supp. 841, insubordination such as we have here has a very relevant medical basis and the board's decision is supported by substantial evidence.

CONCLUSION

The hospital board's denial of staff privileges to Petitioner was based upon substantial evidence and the Trial Court erred in substituting its judgment for that of the board. If the false standard of Dr. Baylor's statistical formula is allowed to stand, then mathematicians and not physicians will determine the standard of medical competency. As a result, hospitals will be faced with a duty to patients that will be in direct conflict with a duty to doctors. Are the courts going to tell hospitals how many patients a doctor must maim, kill or simply mis-diagnose before he can be denied staff privileges? The better rule is the law of *Sosa:* "Courts must not attempt to take on the escutcheon of caduceus." See *Sosa v. Board of Managers of ValVerde Memorial Hospital*, 437 F.2d 173, at p. 177.

No conflict exists between the decisions of the Fifth Circuit in this case and the decisions of other circuits or the Supreme Court. A just and learned Opinion was written in the Court below and there exists no reason for this Court to issue a writ of certiorari to review the judgment or opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted.

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CERTIFICATE OF SERVICE

THIS is to certify that a true and correct copy of the above and foregoing Brief of Respondent in Opposition to the Petition for Writ of Certiorari, has on this the 24 day of May, 1978, been mailed to the attorney for the Petitioner, by placing the same in the United States Mail, certified, return receipt requested, addressed to Mr. Broadus A. Spivey, Spivey, Hazel & Grigg, Post Office Box 2011, Austin, Texas 78768.

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